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IN THE COURT OF APPEALS OF INDIANA

COURTNEY SIMPSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0804-CR-313
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0704-FA-55164

October 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Courtney Simpson pleaded guilty to neglect of a dependent as a class A felony and possession of marijuana as a class D felony. The trial court subsequently sentenced Simpson to an executed sentence of thirty years imprisonment. On appeal, Simpson challenges her sentence as inappropriate.

We affirm.

On March 30, 2007, a pregnant Simpson and her two children, then five-year-old C.C. and then four-year-old E.S., were living with Simpson's boyfriend, Christopher Montgomery, in a motel room in Marion County, Indiana. After returning home from work, Simpson watched as Montgomery threw E.S. to the floor because he did not respond quickly enough to Montgomery's command. E.S. exhibited signs of seizures after Montgomery threw him to the floor. Simpson cleaned blood from E.S.'s ear and from his mouth. Instead of seeking medical attention for E.S., Simpson put him to bed and went to sleep herself. When she awoke, E.S. was unresponsive. Simpson took E.S. to the hospital where he was pronounced dead. An autopsy revealed that E.S. had a laceration in his mouth and on his left forehead, a skull fracture along the left rear of his skull, a four-inch contusion on his left forehead, and what appeared to be rope marks on his ankles and wrists. Simpson explained that the mark on E.S.'s forehead was caused when Montgomery punched E.S. in the forehead a few days earlier. With regard to the marks on E.S.'s wrists and ankles, Simpson explained that Montgomery would hog-tie E.S. because Montgomery was upset that E.S. sucked his thumb.

On April 5, 2007, the State charged Simpson with two counts of neglect of a dependent as class A felonies, one count of dealing in marijuana as a class D felony, and one count of possession of marijuana as a class D felony. On August 22, 2007, Simpson pleaded

guilty to one count of neglect of a dependent and to possession of marijuana, and the State agreed to dismiss the remaining charges.[1] Pursuant to the plea agreement, sentencing was left to the discretion of the trial court, except that the sentences for the two offenses had to be concurrent. The trial court held a sentencing hearing on March 5, 2008. After Simpson's presentation of witnesses and evidence, the trial court made the following statement:

> All right. In sentencing Ms. Simpson the Court is going to find first of all as mitigating the fact that she did accept responsibility for her actions by pleading guilty. Court is also going to find as mitigating the fact that it does appear, based on her testimony, that she did suffer from abuse at the hands of Mr. Montgomery. The Court is going to find that - - well, I think it was the State that put forth that imprisonment would impose a hardship on her dependents and I am not going to find that as a mitigator, primarily because of what happened to [E.S.], and so I don't believe that - - well, I guess I can't say that - - I'll find it as a mitigator but I'm going to give it minimal weight because I think Ms. Simpson you said it right, when nobody - - nobody wins in this situation, and your son [C.C.], who's father's in prison for a long period of time, you have your new daughter and obviously her dad is going to get some serious time, Mr. Montgomery, and both of those, you're the parent of - - the other parent of those two children and you're going to get some time and so those are the ones that really do suffer. So - - but she shouldn't get credit for that and so to the extent that it is a mitigator, I'm going to give it very minimal weight. I'm also going to find as a mitigator the fact that she did in fact testify for the State of Indiana. I noted that the State did not put that out there as a mitigator nor did Defense argue that, but nevertheless, I believe that is a mitigating circumstance. As to aggravating circumstances I find her criminal history is aggravating and I will note as an adult she only has two convictions, both of those are batteries that were misdemeanors, as A's [sic], but I know those are crimes of violence and I note in both of those situations she was given the opportunity to right herself what was an obvious anger-management issue, in both of those situations she did not do so and her probation was revoked in both of those battery cases, so I do find her criminal history as an aggravating circumstance. I also find the nature and circumstances of this crime were aggravating and I base that on Ms. Simpson's testimony, albeit, it was at another trial, but I did get to hear about that, and I know I can't consider the other evidence that I heard from the other trial, as it related to the facts of this case, but I do think that I can consider as an aggravating circumstance the

[1] We note that on July 26, 2007, prior to the plea agreement, the State moved to dismiss the dealing charge on grounds that it was declining prosecution.

> nature and the circumstances as I derive from her testimony in that case, because it was out of her mouth. And to that extent the Court - - as the State offers this was all done in front of [C.C.], who was a very young child himself and I can only think what he's going to have to grow up, as every time he remembers that with watching his brother be thrown from six feet onto the ground, only to be killed. And I will also remember her testimony as saying as she went through it, basically showed this Court, showed this jury, what she saw her son go through and it was a seizure-type of episode and the Court was disturbed at the fact that she went to sleep after seeing that, and so to that extent I find the nature and the circumstances are aggravating.

Transcript at 70-72. The trial court ultimately found that the aggravating and mitigating circumstances balanced, and therefore imposed the advisory sentence of thirty years for class A felony neglect of a dependent and the advisory sentence of one and one-half years for the class D felony possession of marijuana. In accordance with the plea agreement, the trial court ordered the sentences be served concurrently. Simpson now appeals, challenging the sentence imposed.

Pursuant to Indiana Appellate Rule 7(B), we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." In reviewing the appropriateness of the sentence imposed, we recognize the special expertise of the trial courts in making sentencing decisions and thus, we exercise with great restraint our responsibility to review and revise sentences. *Scott v. State*, 840 N.E.2d 376 (Ind. Ct. App. 2006), *trans. denied*. We further note that upon appeal, the burden is on the defendant to persuade us that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006). When the trial court imposes the advisory sentence, this burden is particularly heavy. *Golden v. State*, 862 N.E.2d 1212 (Ind. Ct. App. 2007).

Simpson asserts that the circumstances of this case are "unique" in that "[m]ost criminal neglect cases do not involve a pregnant defendant who was threatened with physical harm to herself and her children if she obtained medical care for one of her children." *Appellant's Brief* at 30. In arguing that a lesser sentence is appropriate, Simpson cites thirteen mitigating circumstances, which she fits into three broad categories: (1) her lesser role in the offense; (2) the abuse she suffered at the hands of her co-defendant (Montgomery); and (3) her potential for successful rehabilitation.

With regard to her argument that she was less culpable than Montgomery, we note that Simpson was charged and convicted for the role she played in E.S.'s death, i.e., neglect of a dependent for failing to obtain immediate medical attention for E.S. when E.S. exhibited symptoms of seizures. By her own admission, Simpson knew E.S. was in need of medical attention and yet she failed to seek appropriate medical care. As E.S.'s mother, Simpson had primary responsibility to care for and protect four-year-old E.S. from harm. She nevertheless failed to seek medical attention when it was urgently needed, and E.S. died as a result.

Simpson further asks for leniency given the abuse she suffered at the hands of Montgomery. Simpson urges us to find as mitigating that she "essentially committed the offense of neglect of a dependent under duress" as she feared Montgomery and thought he might follow through on his threat to kill her, her unborn child, C.C., and E.S. if she sought medical help for E.S. *Id.* at 9. We note that the trial court did not overlook the domestic violence aspect and indeed afforded it mitigating weight in deciding what sentence to impose. To the extent Simpson is arguing that the trial court abused its discretion in failing to afford sufficient mitigating weight to the situation in which Simpson found herself, such

claim is no longer subject to review. *See Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *reh'g granted on other grounds*, 875 N.E.2d 218 (2007) ("[b]ecause the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, . . . a trial court can not now be said to have abused its discretion in failing to 'properly weigh' such factors").

To the extent Simpson claims that the domestic violence she suffered should impact our consideration of the nature of the offense, we are swayed by the more tragic outcome, i.e., the death of a four-year-old child because his mother went to sleep instead of seeking medical attention for him when it was urgently needed. Like the trial court, we too are sympathetic of the effects of domestic violence and by no means intend to belittle victims of domestic violence or trivialize such situations. Nevertheless, we cannot say that the sentence imposed is inappropriate in light of the nature of this offense.

Finally, Simpson maintains that she is well on her way to being rehabilitated. Simpson asserts that she has taken advantage of every opportunity to improve herself and points to her many accomplishments while in jail, such as completing alcoholics anonymous, narcotics anonymous, group therapy, and anger management training, and obtaining her GED. Simpson also asserts that her change in character and attitude since E.S.'s death indicates that the offense was a result of circumstances unlikely to reoccur. Simpson is to be commended for her efforts and accomplishments, but we do not believe such warrants a reduction of her sentence below the advisory.

Simpson cites additional mitigating factors probative of her character. Simpson asserts that she cooperated with authorities and pleaded guilty and that she voluntarily

testified against Montgomery without receiving any benefit from the State in terms of her plea agreement. Simpson also asks that we consider the hardship on C.C. and her infant daughter. Finally, Simpson, citing the fact that she has "only" two prior misdemeanor convictions, argues that her criminal history should not be considered as significantly aggravating.[2] *Appellant's Brief* at 28. As set forth in the trial court's sentencing statement reproduced above, the trial court expressly considered each of these circumstances in deciding what sentence to impose. To the extent Simpson is arguing that the trial court abused its discretion in affording insufficient or too much weight to these circumstances, such claim is no longer subject to review. *See Anglemyer v. State*, 868 N.E.2d 482.

In its sentencing statement, the trial court demonstrated that it thoroughly and thoughtfully considered the aggravating and mitigating circumstances. Giving due deference to the trial court, we cannot second-guess its determination as to the weight to be afforded the mitigating and aggravating circumstances. Having reviewed the record, we conclude that the nature and circumstances of this crime and Simpson's character do not warrant a lesser sentence. We therefore affirm that the trial court's imposition of concurrent advisory sentences for class A felony neglect of a dependent and class D felony possession of marijuana.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur

[2] Simpson's criminal history consists of two misdemeanor convictions for battery. As aptly noted by the trial court, such convictions indicate that Simpson has anger control issues. The trial court also properly considered the fact that Simpson was afforded probation for both offenses and that she failed at that opportunity and had her probation revoked. In both instances, Simpson violated her probation by failing to do community service, failing to attend anger management counseling, failing to maintain employment, testing positive for marijuana, and testing positive for cocaine.